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SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

NO. 855

COMMONWEALTH EX. REL. JAMES F. TORRANCE,
Petitioner

v.

JOSEPH SALZINGER, Warden of the Dauphin
County Prison, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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TABLE OF CONTENTS

	PAGE
Opinions of the Court Below	1
Jurisdiction	1
Question Presented	2
Constitutional Provision Involved	2
Statement of the Case	3
Reasons for Granting Writ	8

APPENDIX

Appendix A—Judgment Below	1a
Appendix B—Portions of Record Showing That Federal Questions Were Timely and Properly Raised	2a

TABLE OF CITATIONS

CASES

Daugharty v. Gladden, (9th Cir. 1958) 257 F. 2d 750, 758	6
Garner v. Louisiana, 368 U.S. 157, 82 S. Ct. 248; 7 L.Ed. 2d 207 (1961)	8, 9
Konigsberg v. State Bar of California, 353 U.S. 252, 77 S. Ct. 722; 1 L.Ed. 2d 810 (1957)	10
Raley v. Ohio, 360 U.S. 423, 437; 79 S. Ct. 1257; 3 L.Ed. 2d 1344 (1959)	6
Schware v. Board of Examiners, 353 U.S. 232, 77 S. Ct. 752; 1 L.Ed. 2d 796 (1957)	10
Thompson v. Louisville, 362 U.S. 199; 80 S. Ct. 624; 4 L.Ed. 2d 654 (1957)	8, 9

ANNOTATIONS

Conviction of Criminal Offense Without Evidence as Denial of Due Process of Law, 80 ALR 2d. 1362	9

AUTHORITIES

Comment, 74 Harvard Law Review, 108	8
Comment, 59 Michigan Law Review, 306, 309	8

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v.

JOSEPH SALZINGER, Warden of the Dauphin County Prison, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered in the above entitled case on January 30, 1962.

OPINIONS OF THE COURT BELOW

The opinion of the Pennsylvania Supreme Court, on original proceeding for Writ of Habeas Corpus, is reported at 406 Pa. 268, 177 At.2d 619.

JURISDICTION

The judgment of the Pennsylvania Supreme Court was entered on January 30, 1962 (Appendix A). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Does not the Fourteenth Amendment interdict a State's conviction and imprisonment of a criminal defendant where at his trial there was introduced only scanty evidence, arguably adverse to the defendant, which does not in reason support the jury's finding of his guilt?

CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV to the Constitution of the United States:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Certiorari is sought in this case to review the refusal of the Pennsylvania Supreme Court to issue a writ of habeas corpus, releasing petitioner from confinement under a state conviction and sentence.[1]

In January 1957, petitioner and eight other persons were indicted on charges of having conspired to cheat and defraud the Pennsylvania Turnpike Commission of vast sums of money in connection with the construction of an extension to the Pennsylvania Turnpike. Petitioner was also charged in a separate indictment with three counts of misbehavior in office, based upon the same charges. (Opinions below p. 53a)

In July 1957, petitioner was convicted on both indictments after a trial which lasted more than seven weeks, and in which all of the charges against the various defendants were consolidated (9 defendants, 4 indictments containing a total of 27 counts) over petitioner's objections. (Opinions below p. 86a).

The theory of the Commonwealth's case was that, as a result of low construction bids received in connection with a proposed extension of the Pennsylvania Turnpike, the Commission acquired a fund from the sale of bonds which was approximately $20,000,000 in excess of the cost of the work. The indictments charge

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1. This petition is companion to a petition filed at the same time for a writ of certiorari to the Court of Appeals for the Third Circuit. The issue presented here was tendered to the Court of Appeals for the Third Circuit, but not decided because of that Court's conclusion that petitioner had failed to exhaust his state remedies as to the issue.

that the defendants conspired among themselves to drain this fund from the Turnpike treasury and into the hands of the officers and stockholders of a company known as the Manu-Mine Research and Development Corporation, by entering into a contract for unnecessary work, for which Manu-Mine was to be paid at an unconscionably high rate. (Opinions below pp. 45a-49a)

The challenged contract was approved unanimously by all of the members of the Pennsylvania Turnpike Commission and was approved as to form, by its general counsel. Except for petitioner and the Commission Chairman (whose relatives owned a substantial interest in the Manu-Mine Research and Development Corporation), none of the Commissioners who approved the contract and the payments made thereunder were indicted in connection with the scandal. (Opinions below —pp. 129a-131a)

The charges against petitioner came at the twilight of a long life of dedicated public service. (Trial record 5105r-5108r) It has been, and is, his contention that there is no evidence, which in reason supports the finding of the jury that he was a participant in the conspiracy. There was no direct evidence that petitioner had participated in the conspiracy. As to this, the Commonwealth's case rests, admittedly, on circumstantial evidence entirely. (Opinions Below—74a-76a; 129a-139a)

The principal thrust of the Commonwealth's case was that the contract with Manu-Mine was let without competitive bidding and lacked certain customary provisions, relating to performance bonds and other security devices; that the work performed was almost entirely unnecessary and was paid for at a rate which was

three to four times its reasonable cost. (Opinions below, pp. 54a-71a) The testimony showed that Manu-Mine reaped profits far in excess of those which it had represented it could expect to receive. However, the contract in and of itself did not authorize the performance of any work at all by Manu-Mine. It provided merely for the rate of payment. All of the work actually done under the contract was required to be separately approved in writing, in advance by the engineers of the Turnpike Commission. (Trial record, 2541r-2543r) All of the payments made for the work were likewise first approved by the engineers and auditors of the Turnpike Commission. (Trial record, 1245r-1249r) The contract itself was approved by all the members of the Commission, as were all payments made thereunder, until the work under the contract was suspended in February of 1956. Moreover, the form of the contract was approved by the General Counsel of the Turnpike Commission and by the Commission's Engineering department. (Trial record 555r, 820r)

About the only circumstance in the entire case which may be said to cast suspicion upon petitioner, is the fact that in December 1954, a few weeks before the contract was approved, petitioner was given a $200.00 gift certificate by one of the officers of the Manu-Mine Company and several months later he used the certificate. However, there was an innocent explanation for this gift. The undisputed evidence is that several months before the bond fund came into existence, petitioner had permitted Manu-Mine to install an experimental gunnite surface on a trench silo on his farm in Westmoreland County and to publicize the installation in farm journals. The gift certificate was given as a

routine business courtesy in appreciation of Mr. Torrance's permitting this to be done. (Opinions below—136a-137a; 181a-183a) It is petitioner's position that the record is devoid of evidence of sufficient probative force to sustain his conviction and that his imprisonment is, for this reason alone, a deprivation of liberty without due process of law.

How The Federal Question Was Raised and Passed Upon

At the conclusion of the Commonwealth's case, petitioner challenged the sufficiency of the evidence by filing a demurrer to the evidence which was overruled. (Appendix B) After his conviction, petitioner challenged the sufficiency of the evidence by motion for arrest of judgment. (Appendix B) Petitioner appealed to the Pennsylvania Superior Court from the denial of this motion. The Superior Court affirmed by a vote of 4-3. The Pennsylvania Supreme Court granted petitioner his application for review on allocatur, but affirmed petitioner's conviction, per curiam, upon the opinion of the Superior Court, by a vote of 4-2. This Court refused to grant certiorari. (364 U.S. 899)

While the sufficiency of the evidence was thus clearly raised at every opportunity provided for by Pennsylvania procedure, petitioner had not specifically invoked the Federal Constitution with reference to that issue.[2] In his application to this Court for certiorari to the Pennsylvania Supreme Court at No. 418 October

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2. (See *Daugharty v. Gladden*, (9th Cir. 1958) 257 F.2d 750, 758; *Raley v. Ohio*, 360 U.S. 423, 437; 79 S.Ct. 1257, 3 L.Ed.2d 1344 (1959).)

Term 1960, the question of the absence of evidence to support petitioner's conviction was not tendered to this court.

After this Court refused certiorari, petitioner began service of the sentences which had been imposed. He then filed a petition for habeas corpus in the United States District Court for the Middle District of Pennsylvania and when that Court refused the writ, he appealed to the Court of Appeals for the Third Circuit. In the federal habeas corpus proceedings, petitioner contended, inter alia, that the record at the state trial was so devoid of evidence pointing to his guilt that his conviction was contrary to due process. The Court of Appeals refused to pass upon this question, holding that petitioner's failure to tender it to this Court in his earlier Petition for certiorari to the Pennsylvania Supreme Court at No. 418 October Term 1960, resulted in a failure to exhaust petitioner's state remedies.

After the decision of the Court of Appeals, petitioner filed an application to the Pennsylvania Supreme Court for the issuance of a writ of certiorari on original jurisdiction. The Court accepted original jurisdiction, but refused to issue the writ, holding that there was not such a total lack of evidence in support of a finding of petitioner's guilt as to raise a federal constitutional question. Review of this judgment is the objective of this petition.

REASONS FOR GRANTING WRIT

This case presents an opportunity to this Court to make clear for the guidance of lower courts, both state and federal, the extent to which the sufficiency of the evidence to support a conviction in a state criminal case must be viewed from the perspective of a federal constitutional problem, in the light of the decisions of this Court in *Thompson v. Louisville,* 362 U.S. 199, 80 S.Ct. 624; 4 L.Ed. 2d 654 (1957) and *Garner v. Louisville,* 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed. 2d 207 (1961). This Court's decision in *Thompson v. Louisville* prompted some authorities to observe that the court had added "a new dimension" to the concept of due process of law. See Comment, 74 *Harvard Law Review* 108. Others have openly doubted that this Court seriously meant to assert that the entry of a judgment of conviction, upon a record which contained insufficient evidence to support a rational finding of guilt, should be considered a violation of the Fourteenth Amendment. See Comment, 59 *Michigan Law Review,* 306, 309. Indeed, some of the members of this Court have expressed misgivings concerning the sweep of that decision. See the Opinion of Mr. Justice Harlan, *Garner v. Louisville,* 368 U.S. 185 at 190.

The language in the majority opinions in both *Thompson* and *Garner* justified these caveats. In *Thompson,* the Court said, at page 199:

> "The ultimate question presented to us is whether the charges against petitioner were so totally devoid of evidentiary support as to render his conviction unconstitutional under the due process clause of the Fourteenth Amendment. Decision

of this question turns not on the sufficiency of the evidence, but on whether this conviction rests upon any evidence at all.

In *Garner*, this Court said, at page 163:

> "As in *Thompson v. City of Louisville*, 362 U.S. 199, our inquiry does not turn on a question of sufficiency of evidence to support a conviction but on whether these convictions rest upon any evidence which support a finding that the petitioners' acts caused a disturbance of the peace."

With such a gloss, these cases do not in fact add a new dimension to the concept of due process of law, but on the contrary they narrow and restrict it. It is therefore important that the matter be reexamined and clarified. This case presents an appropriate opportunity to do so and at the same time to redress a miscarriage of justice of gravity and magnitude.

The holdings in *Thompson* and in *Garner*, it is submitted, were not startling innovations in the field of federal constitutional law, but rather the natural and logical application, in the field of criminal convictions, of well recognized traditional constitutional principles which compel the conclusion that it is a violation of due process for a state to uphold a conviction entered upon a record so devoid of evidentiary support that a jury could not, in reason, have entertained the belief that the defendant was guilty of the crime charged. See Annotation: *Conviction of Criminal Offense Without Evidence as Denial of Due Process of Law*, 80 ALR 2d 1362.

Reasons for Granting Writ.

In *Konigsberg v. State Bar of California*, 353 U.S. 252, 77 S. Ct. 722, 1 L.Ed. 2d 810 (1957), this Court examined the record of the proceedings in a state tribunal and held at page 733:

> "In this case we are compelled to conclude that there is no evidence in the record which rationally justifies a finding that Konigsberg failed to establish his good moral character or failed to show that he did not advocate forceful overthrow of the Government. Without some authentic reliable evidence of unlawful or immoral actions reflecting adversely upon him, it is difficult to comprehend why the State Bar Committee rejected a man of Konigsberg's background and character as morally unfit to practice law. As we said before, the mere fact of Konigsberg's past membership in the Communist Party, if true, without anything more, is not an adequate basis for concluding that he is disloyal or a person of bad character. *A lifetime of good citizenship is worth very little if it is so frail that it cannot withstand the suspicions which apparently were the basis for the Committee's action.*" (emphasis added)

In *Schware v. Board of Bar Examiners*, 353 U.S. 232, 77 S. Ct. 752; 1 L.Ed. 2d 796 (1957), this Court held that Schware had been deprived of due process in being denied the right to practice law in New Mexico because the record there contained no evidence which "rationally justified" a finding that he was morally unfit to practice law. This Court reached this conclusion notwithstanding there was evidence in the record that he had been arrested, had used aliases, and had been a member of the Communist Party.

The record in these cases contained as much evidence which reflected upon Konigsberg's or Schware's fitness to practice law, as did the record in petitioner's criminal trial to support a find of his guilt. It is submitted that the requirement of "no evidence" laid down in *Thompson* and *Garner* should be broadened to suit the more accurate formulations suggested in *Konigsberg* and *Schware*—i.e. "no evidence *which rationally supports the finding.*"

It is certainly a more serious deprivation of due process to be deprived of one's liberty, than to be denied the opportunity to practice a profession. A lifetime of good citizenship, *a fortiori*, ought to protect one from conviction and imprisonment on evidence of so little probative value.

It may be possible, in some jurisdictions, to draw a distinction between evidence sufficient to support a "rational finding" and evidence sufficient to justify submission of a case to a jury. Such a distinction becomes metaphysical; however, in those jurisdictions where the standard which determines whether a case must be submitted to the jury is the existence of evidence which would in reason support the findings necessary to their decision. This is the standard which determines the submissibility of a case in Pennsylvania and was the very standard applied by its courts in determining the sufficiency of the evidence to support the jury's findings of petitioner's guilt. (Opinions below, p. 55a)

The salutary constitutional principles reflected by the decisions in *Thompson* and *Garner* are denigrated by the "no evidence" language of these decisions. State courts and lower federal courts, because of the language

of *Thompson* and *Garner*, may conclude that a trial record containing insufficient evidence in reason to support a guilty verdict may still contain "some evidence" and therefore that no federal right of the defendant's is affected by his conviction. It seems almost certain that this was done by the court below, with the result that petitioner did not get that Court's close and serious consideration of the merits of his position. Petitioner's case presents an opportunity for this Court to provide the guidance and clarification which the state courts and lower federal courts require in this important developing field of constitutional law. For these reasons it is repectfully requested that a Writ of Certiorari be issued.

ELDER W. MARSHALL
GILBERT J. HELWIG
REED, SMITH, SHAW & MCCLAY,
Attorneys for petitioner

APPENDIX A

Judgment Below

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, EX REL. JAMES F. TORRANCE v. JOSEPH SALZINGER, Warden of the Dauphin County Prison	Miscellaneous Docket No. 12 No. 278

ORDER

AND NOW January 15, 1962 a rule to show cause why the prayer of the within petition should not be allowed is granted; returnable on January 16, 1962 at 10:00 A.M., at Philadelphia; and it is directed that the Prothonotary of this Court advise Huette F. Dowling, Esquire, Special Deputy Attorney General of the return date of this rule.

BY THE COURT

JOHN C. BELL, JR.

Chief Justice

January 30, 1962 Rule discharged and Petition dismissed.

BELL, C.J.

APPENDIX B

Portions of the Record Showing That the Federal Questions Was Timely and Properly Raised

Excerpts from Record at Criminal Proceedings

pp. 3110r-3111r:

Mr. Burch: If the Court please, I present a demurrer on behalf of James F. Torrance in No. 216 January Sessions, 1957, which is the conspiracy charge, and I also present a demurrer to No. 220 January Sessions, 1957, which is the misbehavior in office charge and that demurrer demurrs to each of the three counts individually.

* * * * * * *

Page 3115r:

The Court: The demurrer of James F. Torrance is overruled.

Mr. Stewart: Exception, Your Honor.

The Court: Exception.

* * * * * * *

Page 67a

Motion in Arrest of Judgment
216 January Session 1957

To the Honorable the Judges of the Court of Quarter Sessions of Dauphin County, Pennsylvania:

And Now, August 1, 1957 comes the defendant, James F. Torrance, by his attorneys Nauman, Smith, Shissler & Hall, and respectfully moves your Honorable Court to arrest the judgment against him for the following reasons:

* * * * * * *

Appendix B.

3. The evidence is insufficient to sustain a verdict of guilty.

4. The evidence fails to sustain the charge for which the defendant was indicted.

* * * * * * *

431a

Motion and Arrest of Judgment On Behalf of James F. Torrance, 220 January Sessions 1957

To the Honorable, the Judges of the Court of Quarter Sessions of Dauphin County, Pennsylvania:

And now, August 1, 1957, comes the defendant, James F. Torrance, by his attorneys Nauman, Smith, Shissler & Hall, and respectfully moves your Honorable Court to arrest the judgment against him for the following reasons:

* * * * * * *

3. The evidence is insufficient to sustain a verdict of guilty.

4. The evidence fails to sustain the charge for which the defendant was indicted.

* * * * * * *

310a

And now, May 26, 1958, each of the motions in arrest of judgment and for a new trial in Nos. 216, 218, 220 and 221 January Sessions 1957 is hereby overruled and the District Attorney of Dauphin County is directed to call the defendants for sentence on Thursday, June 5, 1958 at 9:30 o'clock A.M. (EDST).

S. Homer L. Kreider
Judge

Petition for Writ of Habeas Corpus.

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
EX REL. JAMES F. TORRANCE
v.
JOSEPH SALZINGER, Warden of the
Dauphin County Prison

#278 Misc.
Docket #12

Petition for Writ of Habeas Corpus

The petition of James F. Torrance respectfully represents:

1. Petitioner, James F. Torrance, a citizen of the Commonwealth of Pennsylvania and of the United States and a resident of the County of Westmoreland, is now unjustly and unlawfully imprisoned and restrained of his liberty and detained under color of the authority of the Commonwealth in the custody of respondent, Joseph Salzinger, Warden of the Dauphin County Prison.

2. The sole claim and authority by virtue of which the petitioner is restrained of his liberty is the judgment of the Court of Quarter Sessions of Dauphin County, Pennsylvania at 216 January Sessions 1957 and at 220 January Sessions 1957, at which petitioner was sentenced to undergo imprisonment in the Dauphin County Prison for consecutive sentences of not less than one nor more than two years.

3. The indictment at No. 216 January Sessions 1957 charges that petitioner and several other persons engaged in a conspiracy to cheat and defraud the Penn-

sylvania Turnpike Commission by entering into a contract for unnecessary work, for which payment was made at an unconscionably high rate. The indictment at 220 January Sessions 1957 charges petitioner with misbehavior in office, for having approved the basic contract through which the conspiracy was allegedly implemented and for approving the payments made under said contract.

4. The imprisonment of the petitioner is contrary to the Constitution of the Commonwealth of Pennsylvania and the Fourteenth Amendment of the Constitution of the United States for the reason that at the trial of petitioner on said charges, there was no evidence introduced which, in reason, sustained a finding that petitioner had participated in such a conspiracy or of his guilt on any of said charges, and due process forbids the entry of a judgment based upon a finding for which there is no rational justification in the record.

5. Petitioner was convicted on July 25, 1957, after a trial which had lasted for several weeks and in which all of the charges against the various defendants had been consolidated and heard together. Thereafter, the Court of Quarter Sessions of Dauphin County refused petitioner's motion in arrest of judgment, which was based in part upon the contention that there was not sufficient evidence to support his conviction. Petitioner appealed to the Superior Court, which affirmed his conviction (except as to one count in the misbehavior in office indictment) by a four to three decision. The opinion of the Superior Court is reported at 190 Pa. Super. 179. Allocatur was granted by this Court, but the convictions were affirmed by a vote of four to two, on the opinion of the Superior Court. Chief Justice (then

Justice) Bell and Justice Benjamin R. Jones dissented. In his dissenting opinion, reported at 399 Pa. 387, Mr. Justice Bell stated, inter alia:

> "I agree with three judges of the Superior Court that the Commonwealth's evidence was legally insufficient to prove Torrance guilty beyond a reasonable doubt of the crime of fraudulent conspiracy of which he was convicted. *I am convinced* that the judgment against Torrance should be arrested and he should be discharged!" (Emphasis by the Court)

6. Petitioner made application to the Supreme Court of the United States for a writ of certiorari at No. 418 October Term 1960, but this was refused in November 1960 (364 U.S. 899). Re-hearing was also refused. In said applications to the United States Supreme Court for certiorari and re-hearing, petitioner did not raise the issue of the sufficiency of the evidence to sustain his conviction.

7. On January 27, 1961, petitioner filed a petition for the issuance of a writ of habeas corpus by the United States District Court for the Middle District of Pennsylvania. The Honorable Austin Staley, Circuit Judge, sitting as a United States District Judge, issued a rule to show cause why the writ should not be granted and at the same time, granted petitioner's application for his release from the Dauphin County Prison during the pendency of said rule. In a written memorandum opinion filed in connection therewith, Judge Staley stated, inter alia:

> "At the hearing before me, Dr. Vincent B. Hall testified that he had been treating petitioner since 1946, that his patient was a man 73 years of age,

suffering from congestive heart failure and advanced hardening of the arteries, that the slightest exertion causes angina pains, that he is a 'candidate for sudden death' and that confinement probably would produce such emotional strain as to gravely aggravate and advance his condition."

8. On June 30, 1961, the U. S. District Court dismissed petitioner's application for a writ of habeas corpus. Upon application of respondent, petitioner's bail was revoked, and he has been continuously confined in the Dauphin County Prison since on or about July 19, 1961.

9. Petitioner filed an appeal to the Court of Appeals for the Third Circuit from the refusal of the District Court to issue a writ of habeas corpus, and on January 10, 1962 the Court of Appeals affirmed the refusal.

10. In the federal proceedings, petitioner contended, among other things, that the record at his trial was so lacking in evidence probative of his guilt that his conviction could not be squared with the requirements of due process of law. Respondent contended, inter alia, that the federal courts were without jurisdiction to entertain petitioner's application for a writ of habeas corpus on such ground because petitioner had failed to exhaust his state remedies on that issue. The Court of Appeals sustained this contention stating:

"Only very recently has the Supreme Court undertaken to set aside state convictions as inconsistent with due process of law because they were not supported by proof of some essential element of the alleged crime. Garner v. Louisiana, Dec. 11, 1961, 30 U.S.L. Week 4070; Thompson v. City of

Louisville, 1960, 362 U.S. 199. Indeed, both of the cited cases were decided after the Supreme Court of Pennsylvania heard petitioner's direct appeal. This chronology may well explain the fact that in the state appellate courts Torrance failed to claim that lack of supporting evidence made his conviction a denial of due process of law. Thereafter, no such claim was made, or could properly have been made for the first time, in petitioner's application to the Supreme Court of the United States for a writ of certiorari. In these circumstances, we think petitioner has not satisfied the requirement of Section 2254 of Title 28, U.S. Code, that, in the absence of special excuse, he shall exhaust available state remedies before seeking habeas corpus in a federal court. *In this connection, it is clear that Pennsylvania practice permits such a constitutional issue as is now newly raised by way of federal habeas corpus to be asserted by habeas corpus in a state court.* See, e.g., Commonwealth ex rel. Haines v. Banmiller, 1958, 393 Pa. 439, 143 A.2d 661; Commonwealth ex rel. Spader v. Myers, 1958, 187 Pa. Super. 654, 145 A2d 870. *If there is substance to the present claim, proper deference to Pennsylvania dictates that the state courts be asked to consider the application of the rulings of the Thompson and Garner cases to the facts of the present case before we do so.* The newness of those decisions emphasizes the propriety of this course. Accordingly, we rule that the petitioner has not exhausted his state remedies with reference to this constitutional claim and, therefore, that it is not ripe for federal adjudication." (emphasis added)

11. Inasmuch as the Commonwealth, by invoking the rule of comity, has dissuaded the U. S. Court of Appeals from considering the merits of this issue, petitioner is entitled in right and in justice, to have the merits of said issue now heard and decided by the State courts.

12. It is desirable and appropriate that this Court should take original jurisdiction of this application for the following reasons, among others:

(a) Inasmuch as this Court affirmed the denial of petitioner's motion in arrest of judgment, it is improbable that any lower court would or should seriously reexamine the question of the sufficiency of the evidence to support a finding of petitioner's guilt, and therefore a petition for writ of habeas corpus to any lower court would be futile and nugatory.

(b) On the other hand, notwithstanding this Court's affirmance of petitioner's conviction, it should nevertheless examine the issue of the sufficiency of said evidence. Because of serious factual misstatements and misrepresentations concerning the evidence which appeared in the briefs on the appeal from petitioner's conviction, the decision of the Court was not made on "a balanced order of facts exactly and fairly stated" as is required in questions involving due process of law. (*Rochin v. California*, 342 U.S. 165, 172) The earlier decision of this Court was made before the decisions of the United States Supreme Court in *Thompson v. City of Louisville*, 362 U.S. 199 and *Garner v. Louisiana*, December 11, 1961, 30 U.S. Law Week 4070, and

consequently, the issues earlier presented were not evaluated and decided in the focus of a serious constitutional problem. As a result, the earlier determination of this Court was tragically erroneous. Therefore, this Court should issue the writ to remedy this injustice, invoking the rule, stated by Mr. Justice Harlan in *Chessman v. Teets,* 354 U.S. 156 at 165:

> ". . . [T]he overriding responsibility of this Court is to the Constitution of the United States, no matter how late it may be that a violation of the Constitution is found to exist . . . We must be deaf to all suggestions that a valid appeal to the Constitution . . . comes too late, because courts, including this Court, were not earlier able to enforce what the Constitution demands."

(c) After a long life of dedicated service to his community and his state, petitioner is advanced in years and declining in health. He has served many months of imprisonment for a sentence unjustly imposed for a crime of which he is innocent. Delay in getting a definitive determination of the merits of his case will jeopardize the possibility of his obtaining vindication during his lifetime.

(d) This proceeding will not require the taking of testimony inasmuch as all of the matters raised by this petition can be decided upon the record on appeal already before this Court in Commonwealth v. Torrance at No. 42 May Term 1960.

Wherefore petitioner prays that this Court proceed by original jurisdiction and that a rule issue directed to respondent to show cause why a writ of habeas corpus should not be granted, returnable at such early date as the Court may direct.

ELDER W. MARSHALL
GILBERT J. HELWIG
REED, SMITH, SHAW & MCCLAY